TUN DATU HAJI MUSTAPHA BIN DATU HARUN

v.

STATE LEGISLATIVE ASSEMBLY OF SABAH & ANOR.

HIGH COURT, KOTA KINABALU
DATO' SYED AHMAD IDID J.
[ORIGINATING SUMMONS NO. K24-16-1993]
25 MAY 1993

CONSTITUTIONAL LAW: Article 18(2)(e) of Sabah Constitution - Is it contrary to and ultra vires Article 8 and 10 of Federal Constitution.

PRACTICE AND PROCEDURE: Order 18 rule 19 - Only in plain and obvious cases - Application must be precise - Is suit premature - Locus standi.

The plaintiff is a member of the Supreme Council of UMNO and an elected representative of the State Constituency of Usukan. When the Constitution of Sabah was amended with the addition of Article 18(2)(d), this affected him when he resigned from USNO to join UMNO. His seat was vacated. The plaintiff then contested a by-election on 11 May 1991 as a representative of the Barisan Nasional and won it. He was then again admitted to the State Legislative Assembly.

Articles 18(2)(e) of the Constitution of the State of Sabah was amended and was assented to by the Yang Dipertua Negeri on 30 December 1992. He filed the originating summons on 13 February 1993, whereas Article 18(2)(e) was only brought into force by its publication in the Gazette on 16 March 1993.

The defendants applied for an order to stay or dismiss the plaintiff's action under O. 18 r. 19 RHC 1980.

Held:

[1] The plaintiff is a State Assemblyman and so he is a party directly affected by the operation of the Article. Therefore the plaintiff has *locus standi.*

[2] There is indeed a situation where the plaintiff is put under stress and uncertainty. So in reality the impasse is a controversy and hence the plaintiff has an interest to protect.

[3] The plaintiff's position as UMNO Deputy Liasion Chairman compels him to seek a declaration and has sufficient reason to do so. Nowadays Courts seldom refuse to make orders on ground it is premature to consider the question.

[4] It is not just an academic exercise should the State Legislative Assembly enforce the new Article 18(2)(e). Not only the plaintiff but others similarly situated will be affected. It is in the interests of the defendants to know early as regards what they can or may do in the exercise of the powers they consider theirs. As of this moment the plaintiff's position is uncertain in the light of the existence of Article 18(2)(e). The plaintiff's action involves questions of constitutionality and the decision will be of public importance. It cannot be said that there is no reasonable cause of action. The plaintiff's action is not frivolous or vexatious when he says he is in a corner and fears what may hit him. A judicial discretion must be used in determining this. It would have been an abuse of the process which he could or should have litigated in the earlier action, but as the Article is a new one and not in existence then, the present action cannot be ruled out on the ground of abuse.

[5] Even though the defendants say the plaintiff purports to challenge a provision of the law which was not in force at time of filing the originating summons, it can nevertheless be seen that this matter raises constitutional questions of importance. This makes the issue justiciable. Hence the submission and arguments by plaintiff and the defendants in a Court of Law regarding the constitutional validity of the "unproclaimed provisions" is neither theoretical nor hypothetical.

[6] An application under O. 18 r. 19 must specify what order is being sought, e.g. to strike out the pleadings or the stay or to dismiss the action and also precisely what is being attacked, that is, whether the whole pleadings or part thereof and if so the alleged offending parts must be clearly specified. It is only in plain and obvious cases that recourse can be had to the summary process under this rule or where the answer is on the face of it "obviously unsustainable". It is not clear in to-day's case that the action can be dismissed as the plaintiff's claim seems to be on some foundation and the defendant's arguments have not demolished it.

[Application for stay granted and case be stated to the Supreme Court].

Cases referred to:

Tun Datu Haji Mustpaha Bin Datu Harun v. State Legislative Assembly of Sabah & Anor. [1992] 1 AMR 48-320 and [1993] 1 CLJ 86 / [1993] 1 MLJ 26 ***(foll)***

Boyce v. Paddington Borough Council [1903] 1 Ch. 109 ***(cit)***
Gouriet's [1977] 3 All ER 70 ***(cit)***
Government of Malaysia v. Lim Kit Siang [1988] 1 CLJ 219 / [1988] 2 MLJ 12 ***(cit)***
Syarikat Perkapalan Selatan Sabah Sdn. Bhd. v. State Government of Sabah & Ors. [1991] 1 MLJ 370 at 373-374 ***(cit)***
State v. Keshab Chandra Naskar [1962] AIR Cal 338 ***(dist)***
Hans Muller of Nurenburg v. Supt. Presidency Jaul Calcutta & Ors. [1955] AIR SC 367 ***(dist)***
Karpal Singh v. Sultan of Selangor [1987] CLJ 342 / [1988] 1 MLJ 64 ***(cit)***
Draper v. British Optical Association [1938] 1 All ER 115 ***(cit)***
Re-Carnayon Harbour Acts [1937] Ch 72 ***(cit)***
Ruislip-Northwood UDC v. LEE [1931] 145 LT 208 ***(foll)***
Lever Brothers & Unilever Ltd. v. Manchester Ship Canal Co. [1945] 78 L1. R 507 ***(dist)***
Roesin v. Attorney-General [1918] LTR 417 ***(dist)***
Republic of Peru v. Peruvian Guano Co. [1887] 36 Ch. D. 489 ***(cit)***
Higgins v. Woodhall [1890] 6 TLR 1 ***(cit)***
Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. [1975] AC 581 ***(cit)***
Chandra Sekhar Singh v. State of Orrisa [1972] AIR SS 486 ***(cit)***
G. Nageswana Rao v. AP & RT Corporation [1959] AIR SS 308 ***(cit)***
Sakai Papers (P) Ltd. v. Union of India [1962] AIR SC 905 ***(cit)***
Canadian Indemnity Co. v. Attorney-General of British Columbia [1975] 56 DLR (3d) 7 ***(cit)***
Thorson v. Attorney-General of Canada (No. 2) [1974] 43 DLR (3d) 1 ***(cit)***
Williamson v. London etc., [1879] 12 Ch. D. 787 ***(foll)***
Sim Kie Chon v. Supt. of Pudu Prison & Ors. [1985] 2 CLJ 268 / [1985] 2 MLJ 385 ***(cit)***
Nagle v. Fielden [1966] 2 QB 633 ***(cit)***
Barton Thompson & Co. Ltd. v. Stapling Machines Co. [1966] Ch. 499 [1966] 2 All ER 22 ***(cit)***

Legislation referred to:
Constitution of the State of Sabah, Article 18(2)(d), (e)
Courts of Judicature Act 1964, s. 48(3)
Rules of the High Court 1980, O. 18 r. 19

Other sources referred to:
De Smith's **Judicial Review of Administrative Action** (4th Edn.,) 1980, pp.. 504-505, 507-508
M.P. Jain's **Indian Constitutional Law** (4th Edn.,)
Sir William Wade on **Administrative Law** (6th Edn.,)
Zamir's **The Declaratory Judgment** (1986) p. 43

For the plaintiff - Dato' Zaki Tun Azmi and Hajjah Azizah Mohd. Dun; M/s. Azizah, Joifin Mohd. Dun & Co.
For the defendants - Datuk Stephen Foo Kiat Shin (assisted by Juprin Wong Adamal)

JUDGMENT

Syed Ahmad Idid J:
The Court has listened to both defendants on their application for an order "to stay or dismiss the plaintiff's action" under O. 18 r. 19 of the Rules of the High Court 1980.

Under the Rules, the Court may order that the pleadings be struck out or amended on the grounds listed from (a) to (d) in O. 18, r. 19(1).

The plaintiff's originating summons claims against the defendants -

(A) a declaration that Article 18(2)(e) of the Constitution of the State of Sabah is invalid, null and void and is of no force and effect in that it is contrary to and *ultra vires* Articles 8(1) and 10(1)(a),(b) and (c) of the Federal Constitution.

Article 8(1): All persons are equal before the law and entitled to the equal protection of the law.

Article 10(1):

(a) Every citizen has the right to freedom of speech and expression and all citizens have the right,
(b) to assemble peaceably and without arms and
(c) to form associations.

(B) The plaintiff also asks for a declaration that Article 18(2)(e) is invalid, null and void and is of no force or effect on grounds that it is vague, uncertain, too wide and that it gives the State Legislative Assembly

(i) arbitrary power to expel members and
(ii) unfettered and unlimited discretion to determine whether a duly elected member should be expelled or
(iii) to determine what constitutes conduct unfit for membership of the Assembly, unbecoming behaviour or an abuse of the mandate given to an elected member by the electorate of his constituency.

(C) Alternatively, the plaintiff asks that in so far as or to the extent that Article 18(2)(e) is contrary to and *ultra vires* Articles 8(1) and 10(1)(a),(b) or (c), or for the other reasons listed in (B) above (e.g. vague, too

wide) that it is thereby invalid, null and void and of no force and effect.

What does the Article, which is said to be offensive or unconstitutional, say?

18(2) An elected or nominated member shall also vacate his seat in the Assembly if -

(e) he is expelled by the Assembly for conduct unfit for membership of the Assembly, for unbecoming behaviour or, in the case of an elected member, for abuse or betrayal of the mandate given to him by the electorate of his constituency.

The learned State Attorney-General of Sabah applies to set aside or strike out the originating summons on these grounds:

(a) the plaintiff has no *locus standi* to commence this action;
(b) there is no reasonable cause of action against the defendants;
(c) the plaintiff's action being not based on any existing fact or existing dispute is premature, theoretical and academic;
(d) the plaintiff had commenced this action prematurely before the impugned provision was brought into force; and
(e) it is frivolous, vexatious and an abuse of the process of the Court.

6. Before I decide on the merits of the defendants' application, it may be worthwhile to mention some facts and discuss the plaintiff's claims:

* Plaintiff is a member of the Supreme Council of UMNO, and an elected representative of the State Constituency of Usukan.

* When the Constitution of Sabah was amended with the addition of Article 18(2)(d), this affected him when he resigned from USNO to join UMNO. His seat was vacated.

* The plaintiff then contested a by-election on 11 May 1991 as a representative of the Barisan National and won it. He was then again admitted to the State Legislative Assembly.

* Tun Mustapha then filed an originating summons at the Kota Kinabalu High Court for a declaration that Article 18(2)(d) was invalid, null and void as it is *ultra vires* Article 10(1) (c) of the Federal Constitution. The defendants' application to strike out that originating summons was dismissed and defendants appealed. The High Court then transmitted the main questions to the Supreme Court by way of a Special Case Stated pursuant to s. 48 (3) of the Courts of Judicature Act 1964.

* Article 18 (2)(e) of the Constitution of the State of Sabah was amended by the Constitution (Amendment) Enactment 1992 and was assented to by the Yang Di-Pertua Negeri on 30 December 1992 .

* The plaintiff filed the originating summons on 13 February 1993 whereas, as Juprin Wong Adamal says, "the impugned provision was only brought into force by its publication in the Gazette on 16 March 1993". The special feature of that Gazette is that it was "Keluaran Khas, Tambahan Pertama" and it reveals that the Enactment

telah dikemukakan dalam Majlis Mesyuarat Dewan Undangan Negeri yang diadakan pada 24 November 1992.

* The Supreme Court decided the appeal in plaintiff's favour and then answered the two questions in the affirmative [see *Tun Datu Haji Mustpaha Bin Datu Harun v. State Legislative Assembly of Sabah & Anor.* [1992] 1 AMR 48-320 and [1993] 1 MLJ 26.

* The decision of the Supreme Court in Kuala Lumpur was delivered on 18 March or two days after the Article 18 (2) (e) was gazetted in Sabah.

Let me discuss the defendants' grounds set forth at

(a) *locus standi;*
(b) whether there is reasonable cause of action;
(c) the dispute is theoretical, or academic; and (e) whether it is frivolous or vexatious. I shall then conclude by dealing with
(d) that plaintiff commenced this action prematurely before the impugned article was brought into force.

(a) *Locus Standi:*

I have considered defendants' citation of *Boyce v. Paddington Borough Council* [1903] 1 Ch. 109

which was approved by the House of Lords in *Gouriet's* [1977] 3 All ER 70 and adopted by the Supreme Court in *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12. This is in respect of the *locus standi* of the plaintiff. On the question of the plaintiff being in the position of an aggrieved party, the findings here accord with those in *Syarikat Perkapalan Selatan Sabah Sdn. Bhd. v. State Government of Sabah & Ors.* [1991] 1 MLJ 370 at 373-374. The cases of *State v. Keshab Chandra Naskar* [1962] AIR Cal 338 and *Hans Muller of Nurenburg v. Supt. Presidency Jail Calcutta & Ors.* [1955] AIR SC 367 are distinguished on their facts. *Karpal Singh v. Sultan of Selangor* [1988] 1 MLJ 64 appears to be instructive in that the applicant was ruled as lacking the necessary *locus standi.* Tan Sri Abdul Hamid, CJ (Malaya) as His Lordship then was, declared the principles quite succinctly in that "... mercy is not the subject of legal rights". The plaintiff is a State Assemblyman and so he is a party directly affected by the operation of the Article. I therefore hold he has *locus standi. Tun Datu Haji Mustapha Bin Datu Harun v. State Legislative Assembly of Sabah & Anor.* [1992] 1 AMR 48-320 at p. 321 at Held (2) and pp. 326-328 and [1993] 1 MLJ 26 at p. 27 at Held (4) and pp. 33-35.

(b) *Is it justiciable?*

Learned Advocate for the defendants strenuously submitted that Courts do not generally entertain an action for a declaration where there is no existing justiciable controversy. **De Smith's Judicial Review of Administrative Action** (4th Edn.,) 1980, pp. 504-505, 507-508. See also **Zamir's The Declaratory Judgment** [1986] p. 43. To ground this, Datuk Stephen Foo says:

> The fact that the plaintiff is an Assemblyman for Usukan Constituency has never been disputed by the defendants or by any one. He has never been prevented by the defendants to attend any meetings of the State Legislative Assembly. There is no evidence at all that he intends to resign from his present party UMNO. Thus, there are no concrete facts based on which a dispute has arisen between the defendants and the plaintiff. Neither are there any circumstances which would attract the operation of the impugned provision on the plaintiff. There is also no real interest for the plaintiff to obtain the declaration sought by him.

Datuk Foo cited *Draper v. British Optical Association* [1938] 1 All ER 115. The situation in *Draper's* is different from that in Sabah. Datuk Zaki Tun Azmi pointed out that Draper could have applied to be reinstated whereas in today's case should the plaintiff be expelled, he has no choice but to go through the hassle of another by-election (p. 24 of the written submission). Tun Mustapha, in his affidavit, declares that his "fear becomes more real with the coalition between USNO and the party in power, PBS, and the consequential expulsion of USNO from Barisan Nasional". There is indeed a situation where plaintiff is put under stress and uncertainty. So in reality the impasse is a controversy and hence I must accept that plaintiff has an interest to protect. I do not think that *Re-Carnavon Harbour Acts* [1937] Ch. 72 can advance defendants' contentions in any way.

I am fortified in this finding by what is stated in **Sir William Wade on Administrative Law** (6th Edn.):

> Declaratory judgments play a large part in private law and are a particularly valuable remedy for settling disputes **before** they reach the point where a right is infringed.

(c) *Theoretical or Academic?*

Is the dispute attached to the facts? According to the learned State Attorney-General, the plaintiff's application is:

> based on mere speculation of a future event" and in the present case as stated above, there is no indication in the plaintiff's affidavits that he is contemplating resigning from his present party UMNO. Thus there are no present circumstances which will attract the operation of the impugned provision on the plaintiff. In the plaintiff's second affidavit dated 5 April 1993 (para. 8) it was mentioned that five State Assemblymen from USNO had joined UMNO and it is anticipated that other USNO State Assemblymen would follow suit in the future. It is submitted that these facts do not concern the plaintiff as no action can be taken by the State Legislative Assembly against the plaintiff under the impugned provision based on the resignation of these other State Assemblymen. If these State Assemblymen fear that they may be expelled under the impugned provision, it is for these State Assemblymen to take action and not for the plaintiff to do so on their behalf. The plaintiff is thus taking action on matters which do not concern him.

I agree with the submission of the learned State Attorney-General on this point. The other State Assemblymen have not applied for a similar

declaration and accordingly they are not involved in these proceedings. Nevertheless, it is the plaintiff's position as UMNO Deputy Liaison Chairman which compels him to seek a declaration and he, in my opinion has sufficient reason to do so. Nowadays Courts seldom refuse to make orders on grounds it is premature to consider the question. *Ruislip-Northwood UDC v. Lee* [1931] 145 LT 208.

(d) *Cause of action:*

Clearly the cases of *Lever Brothers & Unilever Ltd. v. Manchester Ship Canal Co.* [1945] 78 Ll. R 507 and *Roesin v. Attorney-General* [1918] LTR 417 do not quite fit to-day's circumstances in that in the first the Act was obscure and in the second the applicant was not affected in any way with the call-up. See **M.P. Jain's Indian Constitutional Law** (4th Edn.) - "... Courts do not decide constitutional issues as an academic exercise". It will, however, not be just an academic exercise should the State Legislative Assembly enforce the new Article 18(2)(e). Not only the plaintiff but others similarly situated will be affected. It is in the interests of the defendants to know early as regards what they can or may do in the exercise of the powers they consider theirs. As of this moment the plaintiff's position is uncertain in the light of the existence of Article 18(2)(e). According to Datuk Zaki the "terms used are so wide and general that the plaintiff is not able to know what he can or cannot do". And he asks: "Would plaintiff be removed if say he drives around in a Rolls Royce?" I am of the opinion that the plaintiff's action involves questions of constitutionality and the decision will be of public importance. I am therefore unable to say that there is no reasonable cause of action. "In point of law ... every cause of action is a reasonable one" (per Chitty J in *Republic of Peru v. Peruvian Guano Co.* [1887] 36 Ch. D. 489.

Additionally, I am unable to describe the plaintiff's action as frivolous or vexatious when he says he is in a corner and fears what may hit him. A judicial discretion must be used in determining this (per Halsbury L.C. in *Higgins v. Woodhall* [1890] 6 TLR 1. It would have been an abuse of the process of the Court if the plaintiff now raises matters which he could or should have litigated in the earlier action (Kota Kinabalu Originating Summons No. 42 of 1992). *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581 but as the Article is a new one and not in existence then, the present action cannot be ruled out on the ground of abuse.

The Effect Of The Impugned Provision Not In Force

On all the above considerations, defendants' arguments do not seem to have withstood the test of legal principles. So let me now go to Datuk Foo's ground (d) or that the plaintiff had commenced this action prematurely before the impugned provision was brought into force. Learned advocate submits that:

> ... since the law was not in force, the plaintiff could not be said to be affected in any way by a law which could not be enforced at the time.

The case of *Chandra Sekhar Singh v. State of Orissa* [1972] AIR SS 486 was cited but that judgment was more on whether the provision was *intra* or *ultra vires* and so not directly on point of premature claim.

From the outset it must be said that every legislature's field of making law (or amending its Constitution) is circumscribed or limited by fundamental rights. *G. Nageswana Rao v. AP & RT Corpn.* [1959] AIR SS 308. Datuk Zaki's comments regarding "colourable legislation" are not appropriate as there is no challenge to the State Legislative Assembly's powers to enact the laws but rather it is plaintiff's claim that the article is unconstitutional. Learned Counsel claims that Article 18(2)(e) "violates the fundamental rights guaranteed in Article 10(a), (b) and (c) of the Federal Constitution". This may be accepted for the purpose of maintaining the plaintiff's action - *Sakai Papers (P) Ltd. v. Union of India* [1962] AIR SC 905 - if the originating summons can be proved to be based on legal foundation. So let me see if this is an appropriate case to strike out the plaintiff's action on the ground that as the Article was not enforceable at time plaintiff filed his originating summons, therefore plaintiff has no leg to stand on.

This is an extremely important matter to consider. If the Defendants can provide me some grounds on which the arguments can stand I will dismiss plaintiff's action at this stage. But so far it appears to me the defendants have not developed this submission in depth apart from the bare statement which I have reproduced above.

Dato' Zaki buttressed his arguments against defendants' submission by citing *Canadian Indemnity Co. v. Attorney-General Of British*

Columbia [1975] 56 DLR (3d) 7. Atkins J held that:

> It would be less than just that the plaintiffs should be denied access to the Court to question the validity of the unproclaimed provisions of the legislation which because of the bare enactment of the provisions seriously affects the plaintiffs in a practical way in their business affairs.

See *Thorson v. Attorney-General of Canada* (No. 2) [1974] 43 DLR (3d) 1.

Even though the defendants say that "plaintiff purports to challenge a provision of the law which was not in force at time of filing the originating summons", it can nevertheless be seen that this matter raises "constitutional question of importance". This then makes the issue justiciable. As I have said previously (see *Tun Datu Haji Mustapha v. State Legislative Assembly & Anor.* [1992] 1 AMR 48-320 at p. 329; [1993] 1 MLJ 26 at p. 35):

> a person whose freedom of activity is challenged can in a proper case have the issue determined so that he knows where he stands.

(and equally so this can enable the defendants to know where they stand). Hence the submission and arguments by plaintiff and the defendants in a Court of law regarding the constitutional validity of the "unproclaimed provisions" is neither theoretical nor hypothetical.

Dato' Zaki's final salvo rings loudly as a political call when he says:

> In our case, the government in power (in Sabah) being the same government that did not hesitate to remove him once using the now void Article 18(2)(d) when he changed parties, there is a real likelihood that the Sabah Government will do the same again, this time using the impugned Article 18(2)(e) if he chooses to change parties.

Whether or not it was a political strategy for the Sabah Legislative Assembly when it delayed gazetting Article 18(2)(e) is not of importance in determining the defendants' application.

In politics as in War and Business, the employment of tactics, the strategising of activities and misleading opponents are the usual order of the day. Learned Counsel should not complain of these if such had been perpetrated by a political party. What remains is this:

> When the Sabah Legislative Assembly enacted the law, that is, Article 18(2)(e), did they do it with frivolity and with no intention of enforcing it or did they do it with the intention of enacting it as law in the discharge of their solemn duty? No assertion has been made that the defendants were only playing cat-and-mouse with the plaintiff or that they were not serious in legislating the article. Legislators must be both respectable and respected and they, whether Parliamentarians or State Assemblymen, must not be flighty. I can therefore conclude that the Sabah Legislative Assembly was serious when it enacted Article 18(2)(e). That being so, the article became law by 30 December 1992 when it was assented to by the Yang Di-Pertua Negeri.

What is the law on this point?

There is Federal Guarantee of State Constitutions. Article 71(4) of the Federal Constitution where its Eighth Schedule makes provisions to be inserted in State Constitutions. By item 11(3) of the Eighth Schedule, "a Bill shall become law on being assented to by the Ruler" [which in Sabah's case means any person exercising the functions of the Ruler - Article 160(2)]. The Yang Di-Pertua Negeri assented or "perkenankan" to the Constitution (Amendment) Enactment on 30 December 1992. This makes it manifest that when Tun Datu Mustapha filed his originating summons on 13 February 1993, the Article was in existence and recognised as "law".

Order 18, Rule 19 - Defendants' application:

Though the learned Advocate for the defendants and the learned Counsel for the plaintiff did not address the Court on the applicability or restrictions of O. 18, r. 19, it must be reminded that any such application must specify what order is being sought, e.g. to strike out the pleadings OR to stay OR to dismiss the action and also precisely what is being attacked, that is., whether the whole pleadings or parts thereof and if so the alleged offending parts must be clearly specified. Williamson *v. London etc.*, [1879] 12 Ch. D. 787. This, in my opinion, has not been done. The defendants asked that the plaintiff's action be stayed OR dismissed. This is like blowing hot and cold.

Secondly, it is only in plain and obvious cases that recourse can be had to the summary process under this rule, per Lindley MR in *Hubbuck*

v. Wilkinson [1899] QB 86 or where the answer is on the face of it "obviously unsustainable". This was echoed in *Sim Kie Chon v. Supt. of Pudu Prison & Ors.* [1985] 2 MLJ 385. See *Nagle v. Fielden* [1966] 2 QB 633 and *Barton Thompson & Co. Ltd. v. Stapling Machines Co.* [1966] Ch. 499/[1966] 2 All ER 22. It is not clear in to-day's case that the action can be dismissed as the plaintiff's claims seems to be on some foundation and the defendants' arguments have not demolished it. On these principles alone, the defendants' application "to strike out **or** stay **or** dismiss" plaintiff's action does not comply with the technical requirements of the Rules.

Conclusion:

I am of the opinion that the validity of the "unproclaimed" or yet-to-be-gazetted provisions (taken as at the time the plaintiff filed his originating summons) is a justiciable issue between the parties to this action. This is an issue of importance. It can be debated by both the State Attorney-General and learned Counsel when the hearing of this action takes place in Court. Considering the above matters and the rules, I am inclined to be lenient on the special aspects of this matter. As I said before, the defendants' application is not precise and can be dismissed. But I shall relent to the learned State Attorney-General's wish. What I propose to do is to give the benefit of the doubt in favour of the defendants and so I shall construe their application as one for "staying these proceedings". On that I now grant defendants' application to stay these proceedings on condition that a case be stated to the Supreme Court as soon as the questions can be framed. Accordingly, I shall adjourn this matter to tomorrow whereupon I shall decide the questions and shall then transmit this case to the Supreme Court in accordance with the Rules of the Supreme Court. There will be no order as to costs. Order accordingly.

UNITED OVERSEAS BANK LIMITED

v.

HEAP HUAT RUBBER CO. SDN. BHD.

HIGH COURT, JOHOR BAHRU
DATO' JAMES FOONG J.
[CIVIL SUIT NO. 22-206 OF 1991]
6 JUNE 1993

PRACTICE & PROCEDURE: Application for amendment to pleading - Preliminary objection against hearing of application - Whether Court functus officio - Whether Court has jurisdiction to hear application before hearing of appeal against decision of SAR.

The defendant made several applications one of which was for amendment to their statement of defence. The plaintiffs objected to the hearing of the applications on the grounds that;

(a) There was an appeal before the Court against the summary decision of the SAR granted in favour of the plaintiffs and as such no purpose would be served for the applications to be heard before the appeal proper;

(b) The Court was *functus officio* once the decision of the SAR was granted. The Court therefore had no jurisdiction to hear the applications until the appeal was to be heard.

Held:

[1] Under O.20 r.5(1) Rules of the High Court 1980 (RHC 1980), the Court may at any stage of the proceedings allow any party to amend his pleadings on such terms as may be just.

[2] O.56 r.1 RHC 1980 provides for appeals against the decision of an SAR to a Judge in Chambers and such an appeal was by way of a rehearing with the Judge treating the matter as if it was up for hearing for the first time. Such being the case the Judge cannot be *functus officio* since he has not even heard the appeal.

[Plaintiffs preliminary objection dismissed].

Case referred to:

Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd. [1986] 1 CLJ 2 / [1986] 1 MLJ 382 ***(dist)***
Adzmi bin Ali & Anor. v. Mohamed Isa bin Kasad [1987] 1 CLJ 445 / [1987] 2 MLJ 199 ***(dist)***